ASTER BINA SDN BHD & ORS v. LEBAR DAUN DEVELOPMENT SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH FCJ
CHE MOHD RUZIMA GHAZALI JCA
AZIZUL AZMI ADNAN JCA
[CIVIL APPEAL NOS: B-02(NCVC)(W)-1960-10-2022
& B-02(NCVC)(W)-2020-10-2022]
22 APRIL 2024

Abstract – *(i) The usual construction of conditions precedent is that if one or more of the conditions precedent had not been fulfilled and had not been waived by the parties, then the agreement falls away upon the expiry of the deadline for the fulfilment of such conditions precedent. In other words, the non-fulfilment of the condition precedent would excuse performance of outstanding contractual obligations; (ii) If the parties had expressly agreed for certain legal consequences to flow from a breach of representation, it would not be open to the courts to rewrite the bargain of the parties; (iii) Under the exception to s. 19 of the Contracts Act 1950, a contract that has been entered into by misrepresentation would not be voidable if the representee had the means of discovering the truth with ordinary diligence.*

CONTRACT: *Agreement – Sale and purchase agreement – Sale and purchase of partially completed housing estate – Development abandoned – Recovery of balance purchase price payable – Whether sale and purchase agreement had already become unconditional – Whether purchase price ought to be paid – Whether termination unlawful – Whether there was breach of representation – Whether there was right of rescission – Contracts Act 1950, ss. 19 & 75*

CONTRACT: *Agreement – Misrepresentation – Sale and purchase agreement – Sale and purchase of partially completed housing estate – Whether contract voidable – Whether representee had means of discovering truth with ordinary intelligence – Whether s. 19 of Contracts Act 1950 applied to pre-contract misrepresentations – Whether error known before contract was signed*

The respondent, Lebar Daun Development Sdn Bhd ('Lebar Daun'), sold to the first appellant, Aster Bina Sdn Bhd ('Aster Bina'), a partially completed development comprising 57 units of linked houses. Lebar Daun alleged that one Tee Kim Hock and Tee Ah Seng ('second and third defendants') were the alter egos and shadow directors of Aster Bina. The sale and purchase agreement ('SPA') was executed between Lebar Daun and Aster Bina at the purchase price of RM13.8 million, out of which Aster Bina only paid RM2.8 million. Under the terms of the SPA, Aster Bina was granted access to the

properties immediately after the execution of the SPA to enable it to commence works on the site. By way of a letter, the parties recorded their agreement to vary the manner of completion where Aster Bina was to pay a further RM13 million in two tranches. This effectively meant that the purchase price had been adjusted upwards, from RM13.8 million to RM14 million. Lebar Daun also agreed to deliver the relevant instruments of transfer within two days from the said letter, *ie*, 26 November 2018. As events transpired, Aster Bina only made a further payment of RM1.8 million towards the purchase price. Title to the properties in question were transferred to Aster Bina. Lebar Daun claimed for RM11.2 million in the High Court, which was the remainder of the purchase price. Lebar Daun's case was that (i) the SPA had already become unconditional and therefore, Aster Bina was bound to pay the purchase price; (ii) the termination by Aster Bina was unlawful; (iii) the second and third defendants had used Aster Bina as a vehicle to conduct business, to escape and evade any legal obligation and to frustrate enforcement proceedings. They ought to be made personally liable for the obligations of Aster Bina under the SPA. Aster Bina counterclaimed for: (i) the return of the RM2.8 million already paid to Lebar Daun; (ii) RM1.38 million as agreed liquidated damages; (iii) RM4,795,463 as the costs and expenses it had incurred on the development; and (iv) RM6.84 million as the loss of profits that would have otherwise accrued to it from the sale of the 57 houses in the development. The High Court found that (i) the breach was not sufficient so as to entitle Aster Bina to terminate the SPA; (ii) Aster Bina was not entitled to terminate the SPA because it had the opportunity to do its own independent checking and had not relied upon the confirmation given by the architect; and (iii) the properties were sold on an as is where is basis. The High Court allowed Lebar Daun's claim against Aster Bina for the amount of RM9 million and found the second and third defendants personally liable for the payment obligations of Aster Bina under the SPA. Aster Bina's counterclaim was dismissed. Hence, the present appeals. In Appeal No. 1960, Aster Bina and the second and third defendants appealed against the whole of the decision of the High Court allowing Lebar Daun's claim against them. In Appeal No. 2020, Aster Bina appealed against the dismissal of its counterclaim.

Held (allowing Appeal No. 1960; allowing Appeal No. 2020 in part)
Per Azizul Azmi Adnan JCA delivering the judgment of the court:

(1) Aster Bina had accepted the architect's confirmation, unaware that it was erroneous. Aster Bina's solicitors provided a confirmation that the conditions precedent under the SPA had been satisfied and that the SPA had thus become unconditional. The parties themselves had also recorded their understanding that the conditions precedent had all been fulfilled on or before 27 June 2018 when they agreed to vary the manner of completion in the letter of 28 November 2018 that was countersigned

by a director of Aster Bina. It was on this basis that Lebar Daun had proceeded to transfer the title to the properties in question to Aster Bina. There was no longer any further contractual obligation for Lebar Daun as seller to perform. All that was left was for Aster Bina as buyer to fulfil its payment obligation, which parties had agreed to defer. For these reasons, the argument that a condition precedent in the SPA had remained unfulfilled, and that this excused Aster Bina from its payment obligations under the SPA could not be accepted. However, it did not follow that Aster Bina was not entitled to terminate the SPA for breach of representation. (paras 34-37)

(2) The confirmation provided by the architect did not exactly follow the formula of words prescribed under cl. 4A.1(e) of the SPA. The architect was supposed to have confirmed that the buildings in question conformed with: (i) the standard code of practice; and (ii) the approved specifications. Instead, the confirmation provided referred to 'approved and standard code of practice'. There was no statement in the confirmation letter to the effect that the partially constructed structures had been put up in accordance with the approved building plans. The only conclusion that a reasonable court could have arrived at was that the architect's confirmation was untrue. This also meant that the representation provided by Lebar Daun to Aster Bina in cl. 10.1(j) of the SPA – that the architect's confirmation was valid, true and accurate – was also untrue. There was thus a breach of a representation under the SPA. The parties had expressly agreed between themselves under the terms of the SPA that a breach of a representation contained in cl. 10.1 of the SPA would entitle Aster Bina to terminate the SPA. Clause 11.2.1 of the SPA provided that '… any breach by the vendor of any of the provisions of this agreement or if any of the representations, warranties and undertakings … be found to be untrue, inaccurate or misleading … the purchaser shall be entitled to: … (b) terminate this agreement by notice in writing.' If the parties to the SPA had expressly agreed for the purchaser to have a right of rescission in the event of a breach of representation, then regardless of how material that breach was, the courts must give effect to the terms agreed. (paras 21, 41, 51, 56, 57 & 59)

(3) Lebar Daun argued that because Aster Bina could have discovered the truth with the application of ordinary diligence, the exception to s. 19 of the Contracts Act 1950 ('Act') applied and Aster Bina would be precluded from claiming misrepresentation. Section 19 of the Act only applied to pre-contract representations and did not apply where the representation in question had been incorporated into the terms of a contract. Aster Bina came into possession of the development site after

A the SPA was signed. There was nothing in evidence to suggest that it knew about or was capable to discover the setting out error before the SPA was entered into. (paras 65, 67 & 74)

(4) As the consequence of the termination of the SPA, Lebar Daun was (i) obligated to return all sums previously paid towards the purchase B price, free of interest (cl. 11.2.1(b)(i)); and (ii) liable to pay to Aster Bina 10% of the purchase price, as agreed liquidated damages (cl. 11.2.1(b)(ii)). Aster Bina had lawfully terminated the SPA, contrary to the findings of the trial judge. The amount of damages that may be claimed by Aster Bina was capped by the amount specified in the C liquidated damages clause, due to s. 75 of the Act. Hence, the claims for developmental expenses and loss of profits could not be maintained. In the absence of any liability of Aster Bina to pay the balance purchase price under the SPA, there would not arise any obligation on the part of the second and third defendants to be personally liable under the D original claim. (paras 21, 76, 78 & 82)

Case(s) referred to:

Inntrepreneur Pub Co v. East Crown Ltd [2000] 3 EGLR 31 ***(refd)***

K Umarkandha Rajah v. EL Magness [1984] 2 CLJ 23; [1984] 1 CLJ (Rep) 416 FC ***(refd)***

E *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA* ***(refd)***

MWB Business Exchange Ltd v. Rock Advertising Ltd [2018] UKSC 24 ***(refd)***

Pennsylvania Shipping v. Compagnie Nationale de Navigation [1936] 2 All ER 1167 ***(refd)***

Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya F *Pasukan Polis & Ors [1995] 1 CLJ 619 CA* ***(refd)***

Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***

Spektra Segmen Sdn Bhd v. TC Autoworld Sdn Bhd & Another Cases [2024] CLJU 2138; [2024] 1 LNS 2138 CA ***(refd)***

United Scientific Holdings v. Burnley Borough Council [1978] AC 904 ***(refd)***

G **Legislation referred to:**

Contracts Act 1950, ss. 19(1), (2), 75

Evidence Act 1950, ss. 56, 57

For the appellants - Goik Kenzu & Christie Ling Chui Lin; M/s Goik, Ramesh & Loo

For the respondent - Mohd Rizal Bahari Md Noor & Amirfarid Nawawi; M/s Bahari H *& Bahari*

[Editor's note: For the High Court judgment, please see Lebar Daun Development Sdn Bhd v. Aster Bina Sdn Bhd & Ors [2020] CLJU 1457; [2020] 1 LNS 1457 (overruled).]

Reported by Lina E

I

JUDGMENT

Azizul Azmi Adnan JCA:

Introduction

[1] This case involved the sale and purchase of a partially completed housing estate that was subsequently abandoned. At the High Court, the plaintiff successfully sued to recover the balance purchase price payable. The defendants appealed. We allowed their appeals for the reasons set out in this judgment. These grounds constitute the judgment of the court.

Material Background Facts

[2] The plaintiff respondent, Lebar Daun Development Sdn Bhd (referred to here as "Lebar Daun" or the plaintiff), sold to Aster Bina Sdn Bhd (the first defendant at the court below, referred to here as "Aster Bina") a partially completed development comprising 57 units of linked houses, located near Kampung Sungai Kandis in Shah Alam. The second and third defendants at the High Court (who are also the second and third respondents in Case No. 1960 before us) were the directors of a company known as Acmar International Sdn Bhd. The plaintiff alleged that the second and third defendants were the alter egos and shadow directors of Aster Bina.

[3] The sale and purchase agreement (the "SPA") was executed between Lebar Daun and Aster Bina on 24 November 2017. The purchase price under the SPA was RM13.8 million, out of which Aster Bina only paid RM2.8 million. Under the terms of the SPA, Aster Bina was granted access to the properties immediately after execution of the SPA. This, according to cl. 12A of the SPA, was to enable Aster Bina to commence work on the site.

[4] Payment of the purchase price was to have been made in accordance with the schedule set out in Annexure B of the SPA. A deposit of RM6.5 million was supposed to have been paid upon delivery of the instruments of transfer to Aster Bina's solicitors. The remainder was to have been paid in six tranches every month thereafter.

[5] By way of a letter dated 26 November 2018[1], the parties recorded their understanding that all the conditions precedent under the SPA had been fulfilled by 27 June 2018. This letter also recorded their agreement to vary the manner of completion. Aster Bina had previously paid RM1 million to Lebar Daun. It was to pay a further RM13 million in two tranches: RM4 million before 26 March 2019 and a further RM9 million before 26 May 2019. This effectively meant that the purchase price had been adjusted upwards, from RM13.8 million to RM14 million.

[6] Lebar Daun also agreed to deliver the relevant instruments of transfer within two days of the 26 November 2018 letter.

[7] As events transpired, Aster Bina only made a further payment of RM1.8 million towards the purchase price. Title to the properties in question were transferred to Aster Bina between 20 and 28 March 2019.

[8] The plaintiff, Lebar Daun, claimed for RM11.2 million, which was the remainder of the purchase price. The action was expressed as one for specific performance – although we would observe that it is in fact only for the enforcement of a payment obligation. In reality therefore, the plaintiff's action was merely a claim for a debt that became due under the SPA, due to Aster Bina's failure to pay the consideration in accordance with the terms of the SPA. Nothing, however, turns on this point.

[9] Lebar Daun as vendor provided representations and warranties under the SPA. At cl. 10.1(j) of the SPA, Lebar Daun warranted that the report referred to in cl. 4A.1(e) was valid, true and accurate. The report referred to in cl. 4A.1(e) was a confirmation from the consultant of Lebar Daun to the effect that the present state of the buildings conformed with "standard code of practice and approved specification". It was common ground that the consultant in question was the architect for the development.

[10] The confirmation pursuant to cl. 4A.1(e) was provided by a letter from Arkitek Berunding Sdn Bhd dated 23 February 2018[2]. This architect's confirmation was also one of the conditions precedent under the SPA.

[11] As events transpired, the setting out of the houses that had been constructed was incorrect. The houses had not been constructed in accordance with the approved building plans. They had been offset by some ten feet, with the result that there was insufficient setback from the property boundaries, and that each individual house constructed had encroached into its neighbouring lot. It was notable that individual titles for the 57 houses had already been issued.

[12] According to one of the directors of Aster Bina, Encik Muhammad Zali bin Md Sah (DW5), he found out about the incorrect setting out in April 2019. Aster Bina informed Lebar Daun of the setting out error on or about 6 May 2019. On 26 June 2019, Arkitek Berunding Sdn Bhd, the consultant architect for the development, provided a written confirmation to Aster Bina regarding the error in the setting out of the buildings that had been constructed.

[13] On 1 July 2019, Aster Bina acting through its solicitors purported to terminate the SPA on account of the setting out error. It may be observed that at the time Aster Bina purported to exercise its right to terminate, the due date for the payment of the balance purchase price had already passed.

Issues

[14] Lebar Daun's case as the plaintiff in the action was simple: it contended that the SPA had already become unconditional and therefore Aster Bina was bound to pay the balance purchase price. It also sought, among others, for a declaration that the termination by Aster Bina was unlawful.

[15] Lebar Daun also claimed that the second and third defendants had used Aster Bina as a vehicle to conduct business, to escape and evade any legal obligation, and to frustrate enforcement proceedings. Hence, it sought to make them personally liable for the obligations of Aster Bina under the SPA.

[16] Aster Bina's statement of defence could have benefited from some reorganisation, but properly understood, it raised (among others) two discrete but related contentions:

(i) first, it contended that, because of the setting out error, the conditions precedent to the SPA had not been fulfilled, with the attendant result that Aster Bina was excused from the performance of its payment obligations; and

(ii) second, Aster Bina's position was that the setting out error entitled it to terminate the SPA for breach of representation.

[17] Aster Bina counterclaimed for:

(i) the return of the RM2.8 million already paid to Lebar Daun;

(ii) RM1,380,000 as agreed liquidated damages;

(iii) RM4,795,463 as the costs and expenses that it had incurred on the development; and

(iv) RM6,840,000 as the loss of profits that would have otherwise accrued to it from the sale of the 57 houses in the development.

At The High Court

[18] The trial judge hearing the matter at first instance made (among others) the following findings:

(i) the breach was not sufficient so as to entitle Aster Bina to terminate the SPA;

(ii) in addition, Aster Bina was not entitled to terminate the SPA because it had had the opportunity to do its own independent checking and had not relied upon the confirmation given by the architect; and

(iii) in any event the properties were sold on an as-is where-is basis.

[19] The High Court allowed the plaintiff's claim against Aster Bina for the amount of RM9 million. It also found the second and third defendants personally liable for the payment obligations of Aster Bina under the SPA. Aster Bina's counterclaim was dismissed.

The Two Appeals

[20] The defendants appealed to this court against the decision of the High Court. In Appeal No. 1960, Aster Bina and the second and third defendants appealed against the whole of the decision of the High Court allowing Lebar Daun's claim against them. Appeal No. 2020 was the appeal by Aster Bina against the dismissal of its counterclaim.

Summary Of Our Findings

[21] We are of the view that both the appeals must be allowed and the orders of the High Court set aside. Our findings in this case may be summarised as follows:

(i) the High Court misdirected itself on the law and facts when it found that the properties in question had been sold on an as-is where-is basis. The correspondence between the parties describing the proposed sale as one being on an as-is where-is basis did not form part of the concluded contract between the parties, due to the existence of an "entire agreement" clause in the SPA, which causes all prior terms, representations or warranties negotiated between the parties to be superseded;

(ii) Aster Bina had accepted the architect's confirmation (unaware that it was erroneous). Once it had done so and once all the other conditions precedent were satisfied, the SPA became unconditional. Aster Bina's solicitors provided a confirmation to this effect. The trial judge was thus correct to reject the defendants' argument that a condition precedent in the SPA had remained unfulfilled and that this excused the first defendant Aster Bina from its payment obligations under the SPA;

(iii) however, this did not mean that Aster Bina was not entitled to subsequently terminate the SPA for breach of representation. In this regard:

(a) the finding of fact by the trial judge that there was no evidence that the partially completed structure had not been constructed in accordance with approved and standard code of practice was against the weight of the evidence that was before the court. In our considered view, based on the evidence on record the only conclusion that a reasonable court could have arrived at was that the 23 February 2018 architect's confirmation was untrue;

(b) this meant that the representation provided by Lebar Daun to Aster Bina in cl. 10.1(j) of the SPA – that the architect's confirmation was valid, true and accurate – was also untrue. There was thus, a breach of a representation under the SPA; and

(c) under cl. 11.2 of the SPA, breach by the vendor of any of the representations in cl. 10.1 entitled Aster Bina as purchaser to terminate the SPA;

(iv) under the exception to s. 19 of the Contracts Act 1950, a contract that has been entered into by misrepresentation would not be voidable if the representee had the means of discovering the truth with ordinary diligence. This provision does not apply in the present case, because s. 19 only applies to pre-contract misrepresentations, and not to a claim made on a representation that has been incorporated as a term of the contract. In any event, there is no suggestion that Aster Bina could have known about the setting out error even before it signed the SPA;

(v) as the consequence of the termination of the SPA by Aster Bina:

(a) Lebar Daun was obligated to return to Aster Bina all sums previously paid towards the purchase price, free of interest; and

(b) Lebar Daun would be liable to pay to Aster Bina 10% of the purchase price as agreed liquidated damages;

(vi) the amount of damages that may be claimed by Aster Bina is capped by the amount specified in the liquidated damages clause, due to s. 75 of the Contracts Act 1950. Hence, the claims for developmental expenses and loss of profits cannot be maintained; and

(vii) in the absence of any liability of Aster Bina to pay the balance purchase price under the SPA, there will not arise any obligation on the part of the second and third defendants to be personally liable under the original claim.

[22] The analyses underlying our findings are set out in the following paragraphs.

Analysis

Were The Properties Sold On An As-is Where-is Basis?

[23] At para. 51 of the grounds of judgment of the court below, the learned judge had stated as follows:

> (51) It is also notable that the properties were offered to D1 on an 'as is where is' basis. This is borne out by the Plaintiff's letter to D2 dated 8.9.2017[3]

[24] The implication of this sentence was, of course, that if the properties in question were sold on an as-is where-is basis, there would not be any representation or warranty accompanying the sale, and therefore the termination by Aster Bina would have been unlawful.

[25] We are of the view that the contents of the letter dated 8 September 2017 could not have formed part of the concluded contract between the parties. This was because the SPA contained an "entire agreement" clause, which superseded any prior term, representation or warranty negotiated between the parties.

[26] The entire agreement clause was contained in cl. 18.1 of the SPA, which reads as follows:

> 18.1 This Agreement constitutes the only agreement between the Parties herein with respect to the subject matters hereof and supersedes all previous negotiations, understanding, and agreements, express or implied, between the Parties. This Agreement may not be discharged, supplemented or amended in any manner except by an instrument in writing signed by the Parties or their duly authorised representative.

[27] The effect of an entire agreement clause has been considered by the Federal Court in *Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73; [2014] 3 MLJ 785. The Federal Court cited with approval the following passage from the judgment of Lightman J in *Inntrepreneur Pub Co v. East Crown Ltd* [2000] 3 EGLR 31:

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long-forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search, and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence, as is suggested in *Chitty on Contract* (28th Ed), Vol 1 paras 12-102; it is to denude what would otherwise constitute a collateral warranty of legal effect.

[28] In that case, the Federal Court held that the entire agreement clause operated only as between the parties to a contract, and that it would not preclude a non-party from raising the existence of a collateral agreement.

[29] The applicable principles were discussed by the Supreme Court in the United Kingdom in the case of *MWB Business Exchange Ltd v. Rock Advertising Ltd* [2018] UKSC 24, and they may be summed up as follows. An entire agreement clause will preclude all prior negotiations or agreements, unless there can be shown to exist a collateral contract. However, a collateral contract cannot stand in the face of an entire agreement clause unless (i) it is capable of operating as an independent agreement, and (ii) it is supported by its own consideration. A collateral agreement that seeks merely to modify the terms of a main agreement would not be considered as an agreement that is capable of operating as an independent agreement and would be struck down by an entire agreement clause. In the present instance, the existence of a collateral contract was not argued let alone pleaded; it must therefore follow that the terms contained in the letter of 8 September 2017 could not have had the effect of modifying the rights and obligations of the parties under the SPA.

[30] The court below thus fell into error when it found that the properties in question had been sold on an as-is where-is basis.

Breach Of Condition Precedent

[31] As alluded to above, the pleaded case of the defendant was two-pronged:

(i) it contended that because the structures had not been constructed in accordance with the approved plans due to the setting out error, it was excused from performing its payment obligations under the SPA. This was on the basis that the architect's confirmation that had been provided pursuant to cl. 4A.(1)(e) (which was a condition precedent to completion of the SPA) turned out to be untrue; and

(ii) in any event, the inaccurate or incorrect architect's confirmation constituted a breach of the representation given by Lebar Daun as seller under the SPA, which entitled Aster Bina to terminate the SPA.

[32] The usual construction of conditions precedent is that if one or more of the conditions precedent has not been fulfilled and has not been waived by the parties, then the agreement falls away upon the expiry of the deadline for the fulfilment of such conditions precedent. In other words, the non-fulfilment of the condition precedent will excuse performance of outstanding contractual obligations.

[33] In *K Umarkandha Rajah v. EL Magness* [1984] 2 CLJ 23; [1984] 1 CLJ (Rep) 416; [1985] 1 MLJ 116, Syed Agil Barakbah FJ described the meaning of condition precedent in a contract in the following manner:

> When the performance of one promise is dependent upon the obligation of the other party to perform his promise arising, the promise which must first be performed is a condition precedent to the performance of the other promise. It is a step which has to be taken by one party before the next step by the other party can be required to be taken (See *Stonehenge Vendor and Purchaser*, 2nd Edition pp. 923 and 924 paras. 1825 and 1827).

[34] In the present case, Aster Bina had accepted the architect's confirmation (unaware that it was, as we shall see, erroneous). Aster Bina's solicitors, through an email dated 9 August 2018 provided a confirmation that the conditions precedent under the SPA had been satisfied and that the SPA had thus become unconditional[4]. The parties themselves had also recorded their understanding that the conditions precedent had all been fulfilled on or before 27 June 2018 when they agreed to vary the manner of completion in the letter of 28 November 2018 that was countersigned by a director of Aster Bina. It was on this basis that Lebar Daun had proceeded to transfer the title to the properties in question to Aster Bina.

[35] There was no longer any further contractual obligation for Lebar Daun as seller to perform. All that was left was for Aster Bina as buyer to fulfil its payment obligation, which parties had agreed to defer.

[36] For these reasons, we were unable to accept the argument that a condition precedent in the SPA had remained unfulfilled and that this excused the first defendant Aster Bina from its payment obligations under the SPA.

[37] However, it did not follow that Aster Bina was not entitled to terminate the SPA for breach of representation. This point is addressed in the following paragraphs.

Was The Confirmation Given Under Clause 4A.1(e) Valid, True And Accurate?

[38] It will be recalled that clause 4A.1(e) required the consultant of Lebar Daun to provide a confirmation regarding the state of the buildings constructed on the properties. The precise language employed was as follows:

> (e) The respective Consultants of the Vendor to provide a written confirmation confirming that the present state of the building are [*sic*] setting out and constructed in accordance with standard code of practice and approved specification.

[39] The receipt by Aster Bina of this confirmation was specified as a condition precedent to completion. As explained, pursuant to cl. 10.1(j) of the SPA, Lebar Daun represented to Aster Bina that the confirmation provided pursuant to cl. 4A.1(e) was valid, true and accurate.

[40] The confirmation was provided by a letter from Arkitek Berunding Sdn Bhd dated 23 February 2018[5], the material portion of which read as follows:

2) As the consultant architect for the project, we confirm that the partially completed structure was constructed in accordance to the **approved and standard code of practice.** (emphasis added)

[41] Now, it will be observed that the confirmation provided by the architect did not exactly follow the formula of words prescribed under cl. 4A.1(e). The architect was supposed to have confirmed that the buildings in question conformed with: (i) the standard code of practice; and (ii) the approved specifications. Instead, the confirmation provided referred to "approved and standard code of practice". There was no statement in the confirmation letter to the effect that the partially constructed structures had been put up in accordance with the approved building plans.

[42] In cross-examination, the architect who had signed the letter, Datuk Ar Mohamad Zahari bin Mohd Zain (DW2), testified that the "standard code of practice" referred to in his letter meant the Uniform Building By-Laws 1984[6]. He was not challenged in this respect.

[43] Even though he was not challenged in cross-examination, it transpired that DW2 was in fact mistaken. Each state in Peninsular Malaysia issues its own by-laws, which are subsidiary legislation promulgated under the Street, Drainage and Building Act 1974. As the development was located in Selangor, the applicable by-laws are in fact the Selangor Uniform Building By-Laws 1986 (and not the Uniform Building By-Laws 1984, which applies in Kuala Lumpur). As these by-laws are subsidiary legislation, the court may take judicial notice of them without the need for evidence of their contents to be led at trial.

[44] By-law 34 of the Selangor Uniform Building By-laws 1986 provides that space must be accorded around buildings "in accordance with a layout plan approved by the competent planning authority or the local council". In addition, the Selangor State Government has issued a set of guidelines and planning standards known as Manual Garis Panduan & Piawaian Perancangan Negeri Selangor (Edisi Kedua). These guidelines expressly provide for setback requirements of 20 feet for the frontage of terraced houses, and 15 feet for the back lanes.

[45] In the case of *Spektra Segmen Sdn Bhd v. TC Autoworld Sdn Bhd & Another Cases* [2024] CLJU 2138; [2024] 1 LNS 2138; [2024] 1 MLJ 398, the Court of Appeal held that the Manual Garis Panduan & Piawaian Perancangan Negeri Selangor (Edisi Kedua) formed part of the Uniform Building By-Laws 1986, and hence the court would be bound to take judicial notice of it pursuant to ss. 56 and 57 of the Evidence Act 1950.

[46] The architect DW2 testified that the as-built setback was only ten or 11 feet[7], and thus, the buildings as constructed did not conform to the approved plans. This testimony too passed unchallenged by the counsel for

the plaintiff at trial. We thus saw no good reason why the testimony of Datuk Ar Mohamad Zahari ought not to have been accepted by the trial court as being representative of the truth.

[47] We are cognisant that the High Court had made a finding of fact that Aster Bina had not led evidence to establish that the partially constructed buildings complied with "approved and standard code of practice". The grounds of judgment of the court below stated as follows:

> (53) As highlighted earlier the architect had given written confirmation on 9 compliance on 23.2.2018. Both the Plaintiff and D1 had relied on the architect's confirmation that the partially completed structure was constructed in accordance to the approved and standard code of practice. It is pertinent to note that there was **no evidence adduced to show that the partially completed structure was not constructed in accordance with approved and standard code of practice.** D1 did not lead any evidence on this aspect of its allegation. I am in agreement with the Plaintiff's argument that setting out of the buildings does not relate nor refer to what is termed as "approved and standard code of practice." I find that D1 did not lead evidence to show that the standard and approved code of practice had been breached by the Plaintiff. (emphasis added)

[48] A court sitting in appeal ought to be slow to disturb a finding of fact by the trial court. It is well established that the appeal court may only do so where the arbiter of fact was "plainly wrong". A finding of fact is plainly wrong if it was one that no reasonable arbiter, similarly circumstanced, could have arrived that the decision of the trial court based on the evidence on record: see *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665; [2016] 2 MLJ 428.

[49] In the present case, the unchallenged testimony of the consultant architect originally engaged by Lebar Daun and subsequently by Aster Bina established that:

(i) when his firm gave the confirmation dated 23 February 2018 that the partially completed structures had been constructed in accordance with "the approved and standard code of practice" what he had meant was that the structures complied with the Uniform Building By-Laws; and

(ii) the as-built setback from the property boundaries was only ten to 11 feet.

[50] As we have seen, the Selangor Uniform Building By-laws 1986, read together with the Manual Garis Panduan & Piawaian Perancangan Negeri Selangor (Edisi Kedua), requires boundary setback to be 20 feet for the frontage of terraced houses and 15 feet for the back lanes.

[51] Accordingly, we are of the view that the only conclusion that a reasonable court could have arrived at was that the 23 February 2018 architect's confirmation was untrue. This also meant that the representation

provided by Lebar Daun to Aster Bina in cl. 10.1(j) of the SPA – that the architect's confirmation was valid, true and accurate – was also untrue. There was thus a breach of a representation under the SPA.

[52] We are cognisant that the statement of defence and counterclaim did not specifically plead breach of cl. 10.1(j) of the SPA. Nonetheless, the defendants did plead that the setting out error constituted a breach of the conditions of the SPA (see paras. 17 and 20 of the defence and counterclaim) and that Aster Bina had lawfully terminated the SPA. In any event, once the question of fact relating to the inaccuracy of the architect's confirmation was established, the remaining issues were all questions of law to be determined as a matter of the proper construction of the SPA. Whether or not the inaccurate confirmation provided by the consultant architect entitled Aster Bina to terminate the SPA was a matter for the court to determine based on a reading of the terms of the SPA.

[53] One must not lose sight of the overriding principle that the object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619; [1995] 1 MLJ 308 at p. 320. The plaintiff cannot be said to have been taken by surprise, because it knew all along that the defendants' position was that the setting out error and the erroneous architect's confirmation entitled Aster Bina to terminate the SPA.

Did This Breach Of Representation Entitle Aster Bina To Terminate The SPA?

[54] The court below was of the view that the setting out error was not a material or serious issue. The grounds of judgment of the High Court stated as follows:

> [I]t is therefore reasonable to conclude that the setting out error is not a material or serious issue but rather, it is an ordinary situation which can occur to any given building project. In my view this is an error that can be rectified. It is possible for adjustments and amendments to be included into the building plans. Such a step was conceded by DW3, who is himself a developer and is knowledgeable on this matter.[8]

[55] We found ourselves unable to agree with this conclusion.

[56] The parties had expressly agreed between themselves under the terms of the SPA that a breach of a representation contained in cl. 10.1 would entitle Aster Bina to terminate the SPA. Clause 11.2.1 of the SPA provides as follows:

> 11.2 Default by the Vendor
>
> 11.2.1 In the event of any breach by the Vendor of any of the provisions of this Agreement or if any of the representations, warranties and undertakings stipulated in Clauses 10.1, 10.2 and 10.3 above shall

A

> at any time be found to be untrue, inaccurate or misleading in any aspect, the notwithstanding anything to the contrary herein contained, the Purchaser shall be entitled to:
>
> …
>
> (b) terminate this Agreement by notice in writing …

B

[57] Now, if the parties had expressly agreed for certain legal consequences to flow from a breach of representation, we fail to see how it would be open to the courts to re-write the bargain of the parties.

[58] Terms of a contract have traditionally been described either as a
C condition or a warranty, with the difference being a breach of condition would entitle the non-defaulting party to terminate the contract, whereas a breach of warranty would sound in damages only. It is well established that a term will be regarded as a condition if the consequences of its breach – being the right of the innocent party to treat himself as discharged – are
D provided for expressly in the contract: see for example the decision of the House of Lords in *United Scientific Holdings v. Burnley Borough Council* [1978] AC 904.

[59] It must be the case that if the parties to the SPA had expressly agreed for the purchaser to have a right of rescission in the event of a breach of
E representation, then regardless of how material that breach is, the courts must give effect to the terms agreed.

Did It Matter If Aster Bina Could Have, With Reasonable Care, Discovered The Setback Error?

F **[60]** Aster Bina obtained access to the site on which the properties were located immediately upon execution of the SPA, in November 2017. The setback error was only discovered in April 2019, almost a year and half after Aster Bina had been in occupation. It is important to note that there was nothing in evidence to suggest that the representatives of Aster Bina had actual knowledge of the setback error prior to April 2019.

G

[61] The High Court was of the view that Aster Bina had every opportunity to verify the setting out of the buildings constructed on the site. Having proceeded to completion and accepted the architect's confirmation, the High Court held that Aster Bina ought not be permitted to resile from its bargain.
H The grounds of judgment on this point stated as follows:

> (49) At the time DW 1 made the survey of the properties, there was already activity at the site. Only after having had possession of the properties for almost one and a half years later did D1 claim that it had been misrepresented by the setting out error.

I

(50) I was not persuaded with the argument by D1 that it had been misrepresented in regard to the setting out error. That argument is untenable as D1 had been in possession of the properties since the ink was hardly dry on the SPA. It had started carrying out works on the properties.

…

(54) In the instant case it is crucial to note that D1 had done its own checking even before it had received the architect's confirmation. Only after having done its own 20 checking did it accept the confirmation. Therefore, the argument by D1 that it had entered into the SPA relying on the undertaking, warranties and representations given by the Plaintiff has no basis and cannot be true.

(55) In this framework I am of the opinion that D1 is estopped and cannot resile from its earlier position after having made its own checking before agreeing to the confirmation given by the architect. It had accepted the architect's confirmation that the conditions precedent had been fulfilled (see *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283). To recount the facts both the Plaintiff and the Defendant had acted on the confirmation with the Plaintiff having given full access of all the properties to D1 and D1 had already carried out works at the location.

[62] It is important not to conflate two distinct contractual terms under the SPA, being the conditions precedent and the representations. Even though the architect's confirmation was relevant to both categories of terms, the right of Aster Bina as the purchaser to terminate the SPA for breach of representation was distinct from the rights and obligations of the parties relating to the conditions precedent under the SPA.

[63] As explained, if a condition precedent is not fulfilled within the period specified under the SPA, then the effect would be that the parties would be excused from the performance of their future obligations under the SPA.

[64] In the present case, Aster Bina was prepared to proceed to completion after fulfilment of the conditions precedent. Indeed, it would have been obligated to do so. It does not follow, however, that the fact that it had proceeded to completion precluded it from exercising its right of termination for breach of representation. There is nothing in the SPA that suggests this to be the case.

[65] Before us, learned counsel for the respondent argued that, because Aster Bina could have discovered the truth with the application of ordinary diligence, the exception to s. 19 of the Contracts Act 1950 applied and Aster Bina would be precluded from claiming misrepresentation.

[66] Section 19 of the Contracts Act 1950 reads as follows:

Section 19. Voidability of agreements without free consent.

(1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

(2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception – If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation – A fraud or misrepresentation which did not cause the consent to a contract of the party on whom the fraud was practised, or to whom the misrepresentation was made, does not render a contract voidable.

ILLUSTRATIONS

(a) A, intending to deceive B, falsely represents that five hundred gantangs of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred gantangs of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred gantangs of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an undervalue. The contract is voidable at the option of A.

(d) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

[67] We are of the respectful view that s. 19 only applies to pre-contract representations and does not apply where the representation in question has been incorporated into the terms of a contract. In order to explain why we say so, it will be necessary to embark upon a slight tangent to examine the two distinct causes of action that may arise when a misrepresentation has occurred.

[68] A representation is a statement relating to factual matters, in this present case one that has been set out in the SPA. A representation may also operate pre-contract, in that it induces a party to enter into contractual

relations. At common law, a claim for breach of a pre-contract representation is a tortious cause of action, the remedy for which is rescission of the contract. Thus, where a party is induced to enter into a contract on the basis of a representation, and the representation that has subsequently been established as false had not been included into the terms of the contract, that party's remedy lies for actionable misrepresentation in tort, or under statute pursuant to s. 19(1) of the Contracts Act 1950. By contrast, if the representation has been incorporated into the contract, then following *Pennsylvania Shipping v. Compagnie Nationale de Navigation* [1936] 2 All ER 1167, it is thought that the claim may only be sustained in an action on the contract. This was because the common law cause of action for misrepresentation merges into a contractual right of action once the representations forming the basis of the complaint were incorporated into the contract subsequently entered into between the parties.

[69] If s. 19(1) is examined closely, it will become apparent that the words "when consent to an agreement is caused by … misrepresentation" refer to the situation where a party has been induced to enter into a contract by means of the misrepresentation. This is, in other words, a scenario dealing with pre-contract representations, which at common law is the tortious cause of action for misrepresentation. Section 19(1) codifies the common law position, providing that the contract that has been entered into on the basis of the misrepresentation would be voidable at the election of the representee.

[70] At common law, the remedy for tortious misrepresentation is rescission. The representee may also elect to nonetheless affirm the contract, but if he does so, he may not (at common law) claim for damages. Section 19(2) of the Contracts Act 1950 addresses this *lacuna*, by providing that "he shall be put in the position in which he would have been if the representations made had been true". If he affirms the contract, the representee will be compensated for the loss of his bargain arising from the fact that the representation had been untrue. (In the UK, this gap was only addressed many years after our Contracts Act 1950, with the introduction of the Misrepresentation Act 1967.)

[71] When the innocent party is possessed of the right to rescind the contract, the contract is said to be "voidable" at the instance of that party. (It will be observed that s. 19 uses the expression "voidable" *passim*.)

[72] By contrast, in a contractual action for breach of representation, the remedy sought is neither rescission, nor to declare the contract in question void. Rather, the remedy would either be for damages, or for the contract to be terminated. Whether the innocent party is entitled to terminate the contract or merely to a claim sounding in damages only, depends on whether the representation in question is a condition of the contract (in contradistinction to a mere warranty) or where the term is innominate, if the

breach of representation is so fundamental that it goes to the root of the contract in question. As explained at para. [56] *ante*, the parties in the present case have agreed that a breach of the representations in cl. 10.1 entitles Aster Bina as the purchaser to terminate the SPA, and hence the terms of cl. 10.1 may properly be termed conditions.

[73] Once it is understood that s. 19 has no application in an action for breach of a representation set out as a term in a contract, it will be plain that the exception to s. 19 would be similarly inapplicable. It is only in pre-contract misrepresentations that the innocent party would be precluded from rescinding the contract where it had the means of discovering the truth with ordinary diligence.

[74] In any event, Aster Bina came into possession of the development site after the SPA was signed. There was nothing in evidence to suggest that it knew about, or was capable to discover, the setting out error before the SPA was entered into.

The Consequences Of Breach

[75] Under the terms of cl. 11.2 of the SPA, breach by the vendor of any of the representations in cl. 10.1 entitled Aster Bina as purchaser to terminate the SPA. Clause 11.2 reads as follows:

> 11.2 Default by the Vendor
>
> 11.2.1 In the event of any breach by the Vendor of any of the provisions of this Agreement or if any of the representations, warranties and undertakings stipulated in Clauses 10.1, 10.2 and 10.3 above shall at any time be found to be untrue, inaccurate or misleading in any aspect, then in such event and notwithstanding anything to the contrary herein contained, the Purchaser shall be entitled to:
>
> (a) the remedy of at law for specific performance against the Vendor and all reliefs following therefrom; or
>
> (b) terminate this Agreement by notice in writing whereupon:
>
> (i) the Vendor shall within seven (7) days from the date of receipt of such notice of termination, refund or cause to be refunded to the Purchaser all monies paid by the Purchaser towards the Purchase Price (including but not limited to the Deposit) free of interest;
>
> (ii) the Vendor shall within seven (7) days from the date of receipt of such notice of termination, pay the Purchasers a further sum equal to ten per cent (10%) of the Purchase Price as agreed liquidated damages. The Vendor hereby acknowledge that the agreed liquidated damages is out of norm and special consideration was given to the circumstances and the nature of the sale and purchase of the Properties and confirm that the Vendor shall not dispute the same;

(iii) subject to Clauses 11.2.1 (b)(i) and (il), the Purchaser shall within seven (7) days withdraw or procure the withdrawal of any caveat which it may have lodged over the Properties and return to the Vendor all documents signed or given by the Vendor to the Purchaser towards purchase of the Properties (other than this Agreement) save and except for the Transfer which shall be retained by the Purchaser for purposes of applying for refund on the stamp duty paid, if already paid, and upon refund thereof, the Transfer if returned by the Stamp Duty Office shall be forwarded to the Vendor: and

(iv) thereafter this Agreement shall be null and void and of no further effect whatsoever and neither Party hereto shall have any claim whatsoever against the other save and except for antecedent breach.

[76] As the consequence of the termination of the SPA:

(i) Lebar Daun was obligated to return all sums previously paid towards the purchase price, free of interest (cl. 11.2.1(b)(i)); and

(ii) Lebar Daun would be liable to pay to Aster Bina 10% of the purchase price as agreed liquidated damages (cl. 11.2.1(b)(ii)).

[77] Ten percent of the purchase price ought to have been RM1.4 million, due to the terms of the 26 November 2018 letter that had amended the total consideration payable. However, Aster Bina only sought to claim RM1.38 million in its counterclaim.

[78] It must follow therefore that Aster Bina had lawfully terminated the SPA, contrary to the findings of the trial judge. Lebar Daun ought not to have been entitled to the balance purchase price. As a consequence of the dismissal of the claim against Aster Bina, the claim against the second and third defendants ought to have been similarly dismissed.

[79] It will be recalled that Aster Bina also counterclaimed for the costs and expenses that it had incurred in connection with the development amounting to RM4,795,463, as well as the loss of profits amounting to RM6,840,000 that it claimed it would have otherwise obtained from the sale of the houses in the development. We are of the view that Aster Bina would not be entitled to these heads of claim for the following reasons:

(i) first, the sum specified in the SPA as being agreed liquidated damages would operate as cap on the damages that may be claimed by Aster Bina, due to the operation of s. 75 of the Contracts Act 1950, which provides as follows:

> Section 75. Compensation for breach of contract where penalty stipulated for.
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the

party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

(ii) second, the appropriate measure of damages where a party to a contract seeks rescission of the contract would be such damages as would have put it in the position had the contract not been entered into, and not the usual measure of contractual damages which is to place the non-defaulting party in the position had the contract been performed. Aster Bina was thus not entitled to claim the loss of profits.

Conclusion

[80] The High Court in this case only addressed the question of whether the SPA had been validly terminated for non-fulfilment of conditions precedent, pursuant to cl. 4A.7 of the SPA. The grounds of judgment of the court below did not address the additional question of whether the setting out error established a right of Aster Bina to terminate the SPA for beach of representation. This was perhaps understandable in the circumstances of the case, because the submissions of counsel for the defendants both here and at the High Court were focused primarily on the issue of alleged non-fulfilment of the conditions precedent, suggesting that counsel themselves did not fully understand their case.

[81] The court below also appeared to have been swayed by the failure of Aster Bina to pay the balance purchase price on time and by the fact that it had been in occupation of the site even before completion of the SPA. But these circumstances do not change the fact that there had been something fundamentally wrong with the development in question and that the parties had specifically addressed this risk through the representation clauses in the SPA. Effect must be given to the parties' bargain, which was to confer to Aster Bina as purchaser the right to terminate the sale and purchase of the property and to unwind the whole transaction.

[82] For the reasons explained above, the orders of the court below are set aside. Aster Bina's appeal in Appeal No. 1960 is allowed. It follows as a consequence that, in the absence of any liability of Aster Bina to pay the balance purchase price under the SPA, there will not arise any obligation on the part of Mr Tee Kim Hock or Dato' Tee Ah Seng, the second and third defendants, to be personally liable under the original claim. Their appeals are thus also allowed.

[83] We allow the appeal in Appeal No. 2020 in part, and give the following further orders on the counterclaim:

(i) Lebar Daun is ordered to return the sum of RM2.8 million paid by Aster Bina in part payment of the purchase price;

(ii) we exercise our discretion to decline to award any pre-judgment interest, on account of Aster Bina's own default to make payment of the consideration in accordance with the terms of the SPA;

(iii) we allow Aster Bina the sum of RM1,380,000 as agreed liquidated damages pursuant to cl. 11.2.1(b)(ii) of the SPA; and

(iv) we award post-judgment interest at a rate of 5% per annum from tomorrow until full satisfaction.

[84] We direct that Aster Bina delivers to Lebar Daun no later than 14 days from today the original issue documents of title of the subject properties and the duly executed transfer forms to effect the re-transfer of the properties to Lebar Daun.

[85] We direct that Lebar Daun bear costs here and below of RM30,000 payable to the appellants collectively.

Endnotes:

1. See p. 781 of encl. 7 in the record of appeal.
2. See p. 638 of encl. 6 of the record of appeal.
3. See encl. 7, p. 818 of the record of appeal.
4. See p. 784 in encl. 7 of the record of appeal.
5. See p. 638 of encl. 6 in the record of appeal.
6. See pp. 226 to 227 of encl. 4 in the record of appeal.
7. See p. 224 of encl. 4 in the record of appeal.
8. See para. 68 of the grounds of judgment of the High Court.